NO: 88-1573

Supreme Court, U.S.
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IN THE

SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1988

RODRIGO ALONSO, ET AL.,
PETITIONERS

v.

LEO'S QUALITY FOODS, ET AL.,
RESPONDENTS

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Should the Supreme Court resolve the three-way split among the Courts of Appeals regarding whether gross negligence violates a union's duty of fair representation?

2. Was summary judgment wrongly granted below on Petitioners' claim for breach of the duty of fair representation where the record evidence would support a jury's finding of gross negligence, but not intentional misconduct, with respect to Respondent Union's failure to file a timely grievance protesting Petitioners' mass discharge?

PARTIES TO THE PROCEEDING

Petitioners are the 33 natural persons who were Plaintiffs-Appellants below, namely: Rodrigo Alonso, Maria Alonzo, Francisco Barba, Jose Becerra, Hector Benavides, Antonia Burciaga, Francisco Burciaga, Adalberto Castellanos, Agustin Castellanos, Melecio Chavez, Alejandro Espinoza, Andrea Fregoso, Carrie Herbert, Antonio Lemus, Angel Lopez, Gerardo Lopez, Cristina Lozano, Efrain Lujan, Filiberto Martinez, Johnnie Mae Matheny, Pascasio Medina, Marcelino Moya, Beatrice Orkis, Juventino Picasso, Jose Ramirez, Arturo Rodriguez, Luis Rodriguez, Carmen Salazar, Rosa Lee Sullivan, Luis Torres, Guillermo Valencia, Gerardo Velez, and Mariano Zayas.

Respondent (Defendant-Appellee below) is United Food and Commercial Workers Union, Local 770 (formerly United Food and Commercial Workers Union, Local 274).

All other persons who were originally party to the lawsuit were dismissed in the District Court.

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OPINIONS BELOW

The decisions of the Ninth Circuit Court of Appeals and the District Court for the Central District of California in this case have not been reported.

JURISDICTION

Petitioners seek review of the Ninth Circuit Court of Appeals' Judgment affirming the California Central District Court's entry of summary judgment in favor of Respondent Local 274.

The Ninth Circuit's Judgment was entered on November 25, 1988. *See* App. 2 (copy of Judgment).

The Ninth Circuit entered an order denying Petitioners' request for rehearing on December 21, 1988. *See* App. 1 (copy of order).

Jurisdiction of this petition is grounded on 28 U.S.C. Sec. 1254(1).

Federal jurisdiction of Petitioners' action against Respondent Local 274 was founded on the right of action judicially implied from Section 9(a) of the National Labor Relations Act, 29 U.S.C. Sec. 159(a), the text of which is reproduced at page 2, *infra*. *See Vaca v. Sipes*, 386 U.S. 171 (1967). In addition, Petitioners' action originally contained a claim against their employer for breach of the collective bargaining agreement pursuant to Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. Sec. 185(a).

STATUTE INVOLVED

Section 9(a), National Labor Relations Act, 29 U.S.C. Sec. 159(a):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

STATEMENT OF THE CASE

1. Introduction.

Petitioners are 33 older production workers who were discharged without notice on November 16, 1984, when their employer of many years suddenly subcontracted out its production work to an affiliated nonunion company in apparent violation of the collective bargaining agreement.

Petitioners contend their Union breached the duty of fair representation by (1) missing the deadline for filing a grievance protesting their mass discharge and (2) conducting only a belated and perfunctory investigation into the merits of their grievance.

Summary judgment should have been denied below because, although it is true that Respondent Union did not

intentionally err, the Union did commit gross negligence.[1]

2. The Mass Terminations.

Petitioners are 33 of the approximately 100 employees of Leo's Quality Foods ("Leo's") who were unexpectedly fired on November 16, 1984.

At the time of their sudden mass discharge, nearly all of the Petitioners were over 40 years old, and all had been continuously employed by Leo's for many years. All had also been dues-paying members of Respondent Local 274 for years.

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1 The District Court below acknowledged that the Union failed to decide, within the time limit set by the collective bargaining agreement, whether to file a grievance:

> [PETITIONERS' COUNSEL:] There's no evidence that a decision ever was made within the time limits of the grievance.
>
> THE COURT: That's correct.

App. 26 (transcript of hearing on motion for summary judgment).

For example, at the time of the mass discharge, Petitioner Orkis was 53 years old, had been continuously employed by Leo's for 28 years, and had been a member of Respondent Union for 27 years.[2] Petitioner Salazar was 48 years old; she had been employed by Leo's and been a member of the Union for 21 years.[3] Petitioner Lemus was 48 and had worked and been a Union member for 17 years.[4] And so on.

The sudden mass termination was explained at the time by a handout -- distributed to the stunned employees with their final paychecks as they were escorted from the Leo's premises by armed

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2 *See* App. 79 (excerpt from Declaration of Petitioner Orkis). All supporting references herein are to papers which are in the record below.

3 *See* App. 78 (excerpt from Salazar Deposition).

4 *See* App. 77 (excerpt from Lemus Declaration).

guards[5] -- which claimed that Leo's owner had "sold Leo's to a new company who will form its own business".[6]

In fact, Leo's was not sold. Although some corporate stock changed hands, Leo's continued to exist as an operating corporation, and Leo's retained the benefits of a tax loss carryforward.[7] The true nature of the "sale" was that Leo's simply cut its labor costs by subcontracting its production work to a

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5 *See* App. 80-82 (excerpt from Orkis Declaration).

6 *See* App. 54 (text of termination notice).

7 *See* App. 61 (excerpt from Declaration of Union attorney Rothner). The Sixth Circuit has held this kind of tax benefit to be sufficient to establish an alter ego relationship on similar facts. *See Miami Foundry Corp. v. NLRB*, 682 F.2d 587, 589 (6th Cir. 1982). The D.C. Circuit considers the tax loss carryforward to be a factor in an alter ego analysis, but not dispositive. *See United Food & Commercial Workers Int'l Union v. NLRB*, 768 F.2d 1463, 1471 (D.C. Cir. 1985).

newly formed, nonunion,[8] but ostensibly independent company ("TWC") that would lease Leo's production facilities -- for a period of only 6 months. After the 6-month period, Leo's was free to take back its production work.[9]

3. The Potential Grievances.

Leo's 6-month subcontracting maneuver appeared to violate several provisions of the collective bargaining agreement between Leo's and Respondent Local 274. Among these were:

(1) Article XXIX, Section 2, which Petitioners contend allowed Leo's to subcontract only if it required the

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8 *See* App. 66-67 (excerpt from Holeman Deposition).

9 *See* App. 50-53 (excerpts from the Leo's/TWC lease and subcontract agreements). Six months, of course, is the limitations period for unfair labor practices under Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 160(b). Coincidence? We think not.

subcontractor to assume the collective bargaining agreement and continue Petitioners' employment as a condition of getting the subcontracted business;[10]

(2) Article I, Sections 1 and 3, which Petitioners contend prohibited Leo's from having its production work done by any persons who were not covered by the collective bargaining agreement;[11]

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10 See App. 49 (excerpt from the collective bargaining agreement). These kinds of clauses impose no duty on the buyer absent a successorship relationship, but they can require the seller to condition the sale on the buyer's assumption of the contract (or at least require arbitration of the issue). *E.g., Local No. 381, IUOE v. Tosco Corp.*, 823 F.2d 265 (8th Cir. 1987) (compelling arbitration); *Nursing Home & Hospital Union No. 434 v. Sky Vue Terrace, Inc.*, 759 F.2d 1094 (3d Cir. 1985) (enjoining transfer pending arbitration); *Local Lodge No. 1266, IAM v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981) (same); *Bressette v. Int'l Talc Co., Inc.*, 527 F.2d 211 (2d Cir. 1975) (compelling arbitration).

11 See App. 45-46 (excerpt from the collective bargaining agreement). *Cf. Warehousemen's Union Local No. 206 v. Continental Can Co.*, 821 F.2d 1348 (9th

(3) Article XXIII, Section 2, which prohibited Leo's from firing anybody without "just and sufficient cause".[12]

4. Time Limit for Grievances.

Article XXIII of the collective bargaining agreement contained strict time limits for filing grievances. The contract allowed a maximum of 10 calendar days after the employer's wrongful action in which to file. Failure to file in timely fashion resulted in a waiver of the grievance which even an arbitrator would be powerless to excuse.[13]

Cir. 1987) (compelling arbitration of dispute over employer's ability to subcontract work covered by collective bargaining agreement).

12 See App. 46 (excerpt from the collective bargaining agreement).

13 See App. 46-48 (excerpt from the collective bargaining agreement).

5. The Union Assumes Responsibility for Filing Timely Grievances.

At Local 274's membership meeting on November 19, the Union's president, Don Holeman, told the discharged employees not to file individual grievances, explaining that Local 274 would take all appropriate action to preserve their contract rights.[14]

This move represented a radical departure from the Union's established policy. According to Ed Dominguez, the Union official who later succeeded Holeman as president of Local 274, the Union's policy had been always to

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14 *See* App. 83-85 (excerpt from Petitioners' verified interrogatory responses). Apparently the Union's assumption of all responsibility for filing any grievances on behalf of the discharged employees was designed to eliminate the administrative inconvenience of dozens of individual grievances. *See* App. 75-76 (excerpt from Respondent Union's summary judgment reply brief).

encourage employees to get their grievances on file in timely fashion, regardless of the Union's initial impression of the degree of merit.[15]

This policy was obviously prudent in light of the collective bargaining agreement's short (and unyielding) time limit for filing grievances.

When Holeman departed from that policy and told Petitioners not to file individual grievances, he left Petitioners entirely dependent on the Union's diligence in meeting the contractual deadline.

6. Union President Instructs Union Attorney to Investigate and Report Back ... Then Goes on Vacation while the Grievance Deadline Expires.

On the same day as the membership meeting, November 19, Holeman instructed

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15 See App. 73-74 (excerpt from Dominguez Deposition).

Local 274's attorney, Glenn Rothner, to investigate the options and report back to him so that he could decide what to do. Rothner testified that, at the time of the November 19 meeting, he did not know whether there was any merit to a grievance.[16]

But while the clock ticked away on the grievance time limit, Holeman went on vacation! After the November 19 meeting, although Rothner did investigate to some degree,[17] and may even have tried to

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16 See App. 64 (excerpt from the Rothner Deposition). The November 19 discussion did not result in a decision about whether to file a grievance; Holeman and Rothner considered that discussion to be merely a preliminary step in setting up the necessary investigation, and both expected it would be followed up by a subsequent decision-making conference. *See* App. 69-70 (excerpt from Holeman Deposition); App. 60 (excerpt from Rothner Declaration); App. 64 (excerpt from Rothner Deposition).

17 Rothner gave two different versions of what he did, one of which effectively reduces that "investigation" to a single 15-minute telephone conversation with

reach Holeman,[18] Holeman did not speak again with Rothner until December 17, 1984 -- 3 weeks after the grievance deadline had expired.[19]

No grievance was ever filed.

7. Proceedings in the District Court.

On May 15, 1985, Petitioners filed their complaint in the United States District Court for the Central District of California.[20] The principal claims of the action were (1) against Leo's for breach of the collective bargaining agreement and (2) against Local 274 for

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Leo's attorney. *See* App. 60-62 (excerpt from Rothner Declaration).

18 *See* App. 72 (excerpt from Holeman Deposition).

19 *See* App. 72 (excerpt from Holeman Deposition); App. 62 (excerpt from Rothner Declaration).

20 Petitioners also filed unfair labor practice charges with the NLRB, but withdrew the charges after learning that the NLRB did not plan to issue complaints.

breach of the duty of fair representation.

After the defendant's first summary judgment motions were denied by the Honorable J. Spencer Letts on September 3, 1986, Petitioners settled with Leo's. After the settlement, Local 274 was the sole remaining defendant.

Local 274 renewed its motion for summary judgment, and on June 1, 1987, Judge Letts orally granted the motion.[21] Judgment was entered on June 24, 1987.[22] On September 9, 1987, Judge Letts issued Supplemental Findings of Fact and Conclusions of Law.[23]

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21 See App. 21-44 (transcript of hearing).

22 See App. 19-20 (copy of judgment).

23 See App. 15-18 (copy of Supplemental Findings and Conclusions).

8. Proceedings in the Ninth Circuit.

Petitioners timely appealed the summary judgment, arguing that Local 274 had breached its duty of fair representation both by missing the deadline for filing grievances and by conducting a perfunctory investigation.

The Ninth Circuit affirmed the judgment in a memorandum decision filed November 25, 1988.[24]

The memorandum decision rejected Petitioners' contention that Local 274 had missed the contractual time limit, finding that Local 274's Holeman and Rothner had considered the merits of potential grievances and affirmatively decided not to file.[25]

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24 See App. 4-14 (copy of Memorandum).

25 But see App. 26 (transcript of hearing on summary judgment motion indicates District Court agreed with Petitioners that Union did not make decision about grievance before contractual time limit had expired).

The Ninth Circuit also rejected the charge of perfunctory investigation, finding that the Union's decision not to file was based on Rothner's investigation, which it found to be adequate under the circumstances.[26]

Petitioners timely sought rehearing, explaining that, when the sequence of events is scrutinized, it becomes quite clear that the Union either made no decision about filing a grievance within the contractual time limit or made that decision before conducting its grievance investigation.

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26 Given the procedural posture of the case, this finding is inexplicable, inasmuch as Rothner offered two different versions of his investigation. In the first version, Rothner's "investigation" effectively consisted of one 15-minute telephone call with Leo's attorney. *See* App. 60-62 (excerpt from Rothner Declaration). It is true that Rothner's deposition testimony claimed a more extensive investigation, but the substantial difference between the two versions alone should have prevented summary judgment.

The Ninth Circuit's memorandum decision recited that Holeman and Rothner together made the decision about whether to file a grievance.[27] In addition, however, Holeman had testified that, after the November 19 meeting with Rothner, he did not again communicate with Rothner (or do anything else on Petitioners' behalf) until after December 17.[28]

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27 In the Court's words:

> They [Holeman and Rothner] decided within the time specified in the CBA not to file any grievance.

App. 11 (Memorandum) (emphasis added).

28 Holeman testified:

> Q. After that [November 19] conversation with Glenn Rothner, what was the next action you took with respect to Leo's?
>
> A. I talked to Glenn Rothner again.
>
> Q. When did that occur?
>
> A. Oh, it would be some time after December 12th, shortly after -- December 12th actually would be after. The 12th, 13th, 14th, 15th, 16th.

Therefore, the Union's decision not to file must have occurred either before November 19 or after December 17. If the former, the decision necessarily occurred before Holeman had learned the results of Rothner's investigation; if the latter, the decision necessarily occurred after the grievance time limit had passed.

The Ninth Circuit denied rehearing in an order filed December 21, 1988.[29] That order, which contained no opinion, left the logical inconsistency unresolved.

Around the 17th of November or shortly thereafter.

Q. Is that the 17th of December?

A. I mean December.

App. 72 (excerpt from Holeman Deposition).

29 *See* App. 1 (copy of order denying rehearing).

REASONS FOR GRANTING THE WRIT

1. The Circuits Are Badly Split.

The Supreme Court defined the permissible limits of union error 22 years ago when, in *Vaca v. Sipes*, 386 U.S. 171 (1967), it established the now-famous "arbitrary, discriminatory, or in bad faith" standard. *See id.* at 190.

The lower courts have since fallen into extreme disarray over the application of this standard to specific cases. Some say the Supreme Court's post-*Vaca* decisions have contributed to, not alleviated, the confusion:

> There are conflicts between state and federal courts, between the federal circuit courts of appeals, and sometimes between decisions of the same circuit; and the Supreme Court's pronouncements in this area can most charitably be likened to a trumpet that gives an uncertain sound.

B. Aaron, "An Overview", *The Changing Law of Fair Representation* (ILR Press 1985).

The Courts of Appeal are badly split over the question whether gross negligence is sufficiently conduct to as to breach the duty of fair representation.[30]

The Circuits have taken three distinct positions: the Seventh Circuit says no; the First, Fourth, Sixth, Eighth, and Eleventh say yes; and the Ninth Circuit says sometimes.

a. Seventh Circuit.

The Seventh Circuit flatly holds that gross negligence is never enough; as far as the duty of fair representation is concerned, a union in Illinois, Indiana or Wisconsin can do everything short of intentional misconduct with absolute

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30 In the words of the Eleventh Circuit, "[t]he only thing that the federal courts seem to be in agreement on with respect to the duty of fair representation is that mere negligence is not a breach of this duty." *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988).

impunity. *E.g., Adams v. Budd Co.*, 846 F.2d 428, 432-33 (7th Cir. 1988), *cert. denied*, 109 S.Ct. 791 (1989).

b. Plurality View.

The plurality view, including at least[31] the First, Fourth, Sixth, Eighth and Eleventh Circuits, is squarely to the contrary.

In the First Circuit, a union's grossly negligent failure to press an apparently meritorious grievance violates the duty of fair representation despite the court's having "rule[d] out any possibility of subjective bad faith,

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31 Some Courts of Appeals have issued rulings that seem incompatible with any view other than that of the plurality, but without explicitly discussing sa gross negligence standard. *E.g., Griesmann v. Chemical Leaman Tank Lines*, 776 F.2d 66, 74-75 (3d Cir. 1985) (vacating jury verdict in union's favor despite apparent absence of evidence of intentional misconduct on ground that jury instructions did not alert jury that union's failure to press plaintiff's contractual rights in arbitration might be basis for imposing liability).

hostility, discrimination or dishonesty on the part of the union officials". *DeArroyo v. Sindicato de Trabajadores Packinghouse*, 425 F.2d 281, 284 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970). *See also Williams v. Sealand Corp.*, 844 F.2d 17, 21 (1st Cir. 1988) (citing *DeArroyo* with approval).

The Fourth Circuit holds that, "[w]hen it addresses the merits of an individual grievance [as opposed to contract negotiations], the union is not entitled to a '"wide range of reasonableness"' in its conduct." *Dement v. Richmond, Fredericksburg & Potomac Railroad Co.*, 845 F.2d 451, 460 (4th Cir. 1988) (emphasis added). The Fourth Circuit answers the Seventh this way:

> [I]t is not necessary that the union's breach be intentional. A union representative could be so indifferent to the rights of members or so grossly deficient in his conduct purporting to protect the rights of members

> that the conduct could be equated with arbitrary action.

Wyatt v. Interstate & Ocean Transport Co., 623 F.2d 888, 891 (4th Cir. 1980); *accord, e.g., Smith v. Local 7898, United Steelworkers of America*, 834 F.2d 93, 96 (4th Cir. 1987).

The Sixth Circuit agrees that "good faith errors do not insulate unions from liability". *Ruzicka v. General Motors Corp.*, 707 F.2d 259, 260 (6th Cir.), *cert. denied*, 464 U.S. 982 (1983).

So does the Eighth Circuit:

> Fraud or bad faith is not necessary to charge unfair representation if the union's conduct is otherwise arbitrary or perfunctory, ... nor must a jury necessarily find substantial evidence of fraud, deceitful action or dishonest conduct to conclude that a union breached its duty of fair representation.

Smith v. Hussman Refrigerator Co., 619 F.2d 1229, 1245 (8th Cir. 1980). *Accord, e.g., Thomas v. Bakery, Confectionery and*

Tobacco Workers Union Local 433, 826 F.2d 755, 763 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 1019 (1988) (allowing claim to reach jury, despite absence of intentional misconduct, where union's failure to introduce critical piece of evidence in arbitration constituted a "serious flaw").

Similarly, in the Eleventh Circuit, "a demonstration that the union acted with reckless disregard for the employee's rights or was grossly deficient in its conduct will suffice". *Harris v. Schwerman Trucking Co.*, 668 F.2d 1204, 1206-07 (11th Cir. 1982). *See also Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519-20 (11th Cir. 1988) (citing *Harris* with approval).

c. Ninth Circuit.

The Ninth Circuit straddles the fence, applying the plurality's rule to ministerial acts, but the Seventh

Circuit's rule to matters involving the exercise of judgment:

> [W]e ask first whether the act in question involved the union's judgment, or whether it was "procedural or ministerial." ... If it is a union's judgment that is in question ... the plaintiff may prevail only if the union's conduct was discriminatory or in bad faith. Arbitrariness alone would not be enough. Only when the challenged conduct was procedural or ministerial does arbitrariness become controlling.

Moore v. Bechtel Power Corp., 840 F.2d 634, 636 (9th Cir. 1988).

d. Need for Supreme Court Guidance.

The 3-way split in the Circuit Courts strongly suggests a clarifying decision is badly needed. *Cf. Bowen v. United States Postal Service*, 459 U.S. 212, 593 (1983) (clarifying the damages standard for unfair representation after observing (euphemistically) that "[a]lthough *Vaca*'s governing principle [regarding damages] is well established,

its application has caused some uncertainty").

The need for guidance is also apparent from the wealth of literature exploring the problem of the lower courts' conflicting approaches. *See, e.g.*, D.L. Gregory, "A Call for Supreme Court Clarification of the Union Duty of Fair Representation", 29 St. Louis U.L.J. 45 (1984).

Petitioners respectfully submit that now is the time to dispel the confusion.

2. Millions of Employees Currently Have No Remedy for Unions' Gross Negligence.

By virtue of the Seventh and Ninth Circuits' hostile standards, the millions of men and women who work in union shops in Illinois, Indiana and Wisconsin, and also (as to nonministerial matters) in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, have no judicial remedy

against outrageous union misconduct that falls short of being intentional.

For unions in those states, this represents a powerful disincentive to careful grievance-handling. In a world of limited economic resources, the quality of unions' contract administration is bound to suffer when there is no cost to sloppiness. Moreover:

> A bad faith standard of fair representation cannot enforce the union's affirmative responsibilities. It can prohibit invidious distinctions like race and possibly sex, and it can inhibit deliberate attempts to sacrifice the rights of individual employees, but it cannot ensure that a union will offer minimal representation to all the employees it serves. In brief, a bad faith standard allows unions to make unfounded decisions as long as there is no evidence of deliberate wrongdoing.

Clark, "The Duty of Fair Representation: A Theoretical Structure", 51 Tex. L. Rev. 1119, 1132 (1973).

For employees in the Seventh and Ninth Circuits -- such as Petitioners -- this represents a fundamental injustice.

3. The Case at Bar Is a Good Vehicle for a Clarifying Supreme Court Decision.

They say that hard cases make bad law. The case at bar is a relatively easy one regardless of the standard ultimately adopted by the Supreme Court; a clarifying decision based on Petitioners' case is likely to be as lucid as fair representation decisions can get.

Consider: If this Court adopts the Ninth Circuit's view, Petitioners' case presents a perfect opportunity to define the outer limits of the ministerial/judgmental distinction, because Petitioners complain both of a ministerial error (the missed deadline) and of a judgmental error (the perfunctory investigation).

If this Court instead adopts the Seventh Circuit's view, Petitioners will lose their case, but in that event -- because the basic equities so strongly favor Petitioners -- there will be no doubt that the Court intended to foreclose liability for everything but intentional misconduct.

And finally, if gross negligence is the correct standard, Petitioners' case is ideal in two respects.

First, the procedural posture of the case -- review from a summary judgment -- both creates decisional flexibility and makes it possible to clarify the fair representation standard without making excessively rigid pronouncements. For example, this Court has the option of saying either that Respondent Union's behavior constitutes unfair representation as a matter of law or merely that Petitioners' case presents a

triable issue regarding whether the Union was grossly negligent.

Second, on the merits of the gross negligence issue Petitioners have a strong case, not a marginal one.

Contrary to the Ninth Circuit's findings that Respondent Union both made a timely decision not to file a grievance and conducted an adequate investigation, when the sequence of events is scrutinized it becomes quite clear that the Union either made no decision about filing a grievance within the contractual time limits or made that decision before conducting its grievance investigation.

This is easily seen:

1. On November 16, 1984, Petitioners were discharged in apparent violation of the collective bargaining agreement. The 10-day clock started running on the time to file grievances.

2. On November 19, 1984, Union president Holeman took the extraordinary step (contrary to established Union policy) of telling Petitioners not to file individual grievances. He assured them the Union would protect their contract rights. He also told Union attorney Rothner to investigate the options and report back so that he could make a decision about filing a grievance. There were 7 days left in which to file.

3. On November 26, 1984, the contractual limitations period for filing grievances expired. No grievance had been filed. What was the Union president doing? He was on vacation! He had not been in touch with Union attorney Rothner since November 19.

4. On December 17, 1989 -- 3 weeks after the grievance deadline passed -- Rothner spoke with Holeman for the first time since November 19. This was the

first moment that Rothner reported on his investigation.

Thus, although it is possible that Holeman secretly decided, before the grievance deadline had expired, that he would not file a grievance on Petitioners' behalf, if he did make that timely decision he must have made it without the benefit of Rothner's investigation.

Similarly, although it is possible that Holeman decided not to file a grievance on the basis of Rothner's investigation, if he did wait for the results of the investigation he must have made the decision whether to file after the contractual deadline had already expired.

It is simply not possible that Holeman <u>both</u> decided not to file a grievance before the deadline had passed

and based his decision on Rothner's investigation.

Therefore the Union either committed the ministerial error of inadvertently missing the grievance deadline, or it committed the judgmental error of consciously letting the deadline pass without having investigated the merits of Petitioners' grievance.

In either event, the Union committed gross negligence.

Because Petitioners' case falls close to the heart of any reasonable standard based on gross negligence, it would be a good vehicle for a decision of the Supreme Court clarifying the fair representation standard.

CONCLUSION

Who should pay the price of unions' gross negligence? Those who suffer? Or those who cause the suffering? We humbly

suggest that to ask the question is to answer it.

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Respectfully submitted,

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